UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LABOR PLUS, LLC, AND ITS SUCCESSOR
WYNN LAS VEGAS, LLC

and Case No. 28-CA-161779

LABOR PLUS, LLC

and Case No. 28-CA-166890

WYNN LAS VEGAS, LLC

and

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES
AND MOVING PICTURE TECHNICIANS,
ARTISTS AND ALLIED CRAFTS OF THE
UNITED STATES AND CANADA
LOCAL UNION 720 (IATSE)
_____/

RESPONDENT WYNN LAS VEGAS, LLC'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

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I. STATEMENT OF THE CASE.

This case presented the improper attempt to foist a collective bargaining obligation on Respondent Wynn Las Vegas, LLC ("Wynn") despite a number of violations to Wynn's due process rights and the complete absence of any legally cognizable obligation for Wynn to collectively bargain with the I.A.T.S.E. Local 720 ("the Union") on behalf of the asserted unit of employees. Specifically, on May 2, 2015, Region 28 conducted a representation election for a unit of stagehand employees employed by Labor Plus, LLC – a labor provider – in the ShowStoppers Theater of Wynn. Both the Union and the Region failed to ever provide notice of the representation election or to allow Wynn's participation in the same. The Petition for Election, Stipulated Election Agreement, and Certification of Representative all failed to identify Wynn as an employer and solely named Labor Plus as the employer of the employees in question. Wynn was never provided official notice of the election or allowed to participate in the same with its own ShowStoppers (Encore) Theater stage technicians who had never worked for Labor Plus. Then, after knowingly impairing Wynn's rights, the Union hoped to coercively impose a collectively bargaining obligation on Wynn as a successor employer despite the fact that Wynn never hired a majority of stagehand technicians from Labor Plus. Such action violates Wynn's due process rights, disenfranchises affected employees, and mocks the established procedures of the National Labor Relations Board ("the Board").

Administrative Law Judge John T. Giannopoulos conducted a hearing on this matter in Las Vegas, Nevada on November 3, 2016. Gregory J. Kamer, Esq. and R. Todd Creer, Esq. of the law firm of Kamer Zucker Abbott represented Wynn. Larry A. "Tony" Smith, Esq. served as Counsel for the General Counsel of the Board. Caren P. Sencer, Esq. represented the Union. On motion by Mr. Smith, the Consolidated Complaint was successfully amended during the hearing

to dismiss Labor Plus as a Respondent, as well as the corresponding unfair labor practice charges. Transcript at 12:8-25; 13:1-25; 14:1-25; 15:1-25; 16:1-25; 17:1-4; **GC Ex. 1(v)**.

Ultimately, the evidence presented at trial clearly demonstrated that the contrived successor employer bargaining obligation asserted by General Counsel and the Union is legally deficient. Wynn did not wholly transfer all the Labor Plus stagehands into its own workforce. Instead, once it terminated the service agreement with Labor Plus, Wynn allowed Labor Plus stagehands to apply for open stage technicians positions at Wynn, to proceed through Wynn's background check and drug testing procedures, and, if hired, to become subject to the terms and conditions of employment set by Wynn. Notably, not all of the former Labor Plus stagehands applied to work with Wynn. Moreover, Wynn did not hire all of the Labor Plus stagehands who applied for open positions. In fact, Wynn posted the open stage technicians positions on its website and hired a number of employees who were never associated with Labor Plus. Most importantly, Wynn never maintained a majority of Labor Plus stagehands in its employee complement and, as a result, never became a successor to Labor Plus. Administrative Law Judge Giannopoulos limited his ruling and analysis to the successorship issue without analyzing or making findings with regard to the violation of Wynn's due process rights.

Notably, beyond the fact that Wynn did not hire a majority of its workforce from Labor Plus employees at a time when the Union was the duly certified representative of a bargaining unit, attempting to force a bargaining obligation on Wynn not only infringes upon Wynn's due process rights, but also blatantly disregards the freedom of choice of employees who may or may not want the Union to act as their bargaining representative regarding their employment with Wynn. In particular, the Union and former Labor Plus employees for whatever reason clearly did not include Wynn in their election petition despite having ample opportunity to do so. Thus,

there has never been an identifiable intention from the affected employees to have the Union represent them with respect to their employment by Wynn. Moreover, the significant number of Wynn employees who have never been associated with Labor Plus never received the right to vote in any representation election. Such employees would be forced to be represented by the Union through a questionable fiat rather than by their own free choice. Such forced action is not the intention of the Act. As these violations to Wynn's due process rights constitute a separate, valid basis for dismissing the Complaint, the Administrative Law Judge should have also dismissed the Complaint for said due process violations.

During the hearing, the Board called the following individuals as witnesses: Rita Taratko, Office Manager for Labor Plus; Monica-Marie Coakley, Assistant Director of Technical Operations for Wynn; and Eric Fouts, a Lead Carpenter in the Encore Theater. Additionally, the parties submitted an extensive factual stipulation as Joint Exhibit 20. One volume of transcript containing the testimony presented during the hearing was prepared and transmitted to the parties on or about November 11, 2016. References in this brief to the transcript are to the party testifying, the page of testimony in the transcript, and the relevant transcript lines referenced (*e.g.*, Fouts 140:1-4). There are also references to General Counsel Exhibits (GC Ex.), Joint Exhibits (Jt. Ex.), and Administrative Law Judge Exhibits (ALJ Ex.).

II. WYNN'S CROSS-EXCEPTIONS.

On March 30, 2017, under separate cover, Wynn filed one cross-exception to the Administrative Law Judge's Decision pursuant to Section 102.46 of the Board's Rules and Regulations. Wynn's cross-exception pertains to the Administrative Law Judge's exclusion of the violation of Wynn's due process rights as a separate and alternative basis for dismissing the Complaint.

III. FACTS AND ARGUMENT IN SUPPORT OF CROSS-EXCEPTIONS.

The Union's motive for skirting the procedural due process requirements inherent in the Act so that it could exclude Wynn and its employees from participation in the representation election proceeding only to then try and foist a bargaining obligation on Wynn was clearly revealed by the Union's counsel during the hearing on Labor Plus's earlier challenges and objections to the election between the Union and Labor Plus. There, the Union's counsel stated:

> We were aware of the situation. The Union was. We didn't ask that the Region direct an election with a joined employer because of Oakwood Care, Oak Care. We knew it would end up in a long battle, so we chose deliberately to seek the election of Labor Plus to get an expedited election. (**JT Ex. 7** at 92:1-5).
>
> You can't force two employers into an election. They can only do it voluntarily because of Green and all those arguments. The Clinton board ruled contrary to Sturgis. The Bush board in all its stupidity ruled against it. And now the board in a case involved sheet metal workers announced last week that they're going to reconsider the doctrine. So we had the choice...Your Honor, we were a lot smarter than they were and now they got trapped.... (**JT Ex. 7** at 93:14-20, 23-24).
>
> So the real fight here is largely with the Wynn. They're not here, they don't have to be. We will, at the appropriate point, ask them to bargain as the successor, either a perfectly clear successor or a burned [sic] successor, but we need that certification, because absent the certification, then the Wynn can say there was not representative here, so that's why we're here. And don't take sympathy on the Wynn. Steve Wynn is a multi-billionaire. If he had some problem, he could have been here, and he certainly could have sent a representative. Whether he knows or not about it makes no difference, because there's no res judicata effect on the Wynn unless we show they were joint employers, and we may do that in the long run. So I, at one point, suggested that it would have been Labor Plus's interest to simply withdraw the objection, let the certification issue. (**JT Ex. 7** at 238:8-23).

At the conclusion of the November 3, 2016 Unfair Labor Practice Charge hearing, the Administrative Law Judge requested that the parties brief the principles set forth in Nw. Glove Co., 74 N.L.R.B. 1697, 1700 n.3 (1947), namely, the Board's statement that, "We need not here pass on the obligation of a successor who takes over without notice, for it is clear here that the corporation, through Wainwright, had full knowledge of all the facts." While the present case is

somewhat factually unique, the principles of fundamental fairness, notice, and knowledge are set forth throughout analogous circumstances. For example, in the seminal Burns case – the resolution of which "turn[ed] to a great extent on the precise facts" of that case – the U.S. Supreme Court emphasized the importance that the asserted successor employer have knowledge of the predecessor's bargaining obligation in order to impose a collective bargaining obligation on the successor employer:

> It is undisputed that Burns knew all the relevant facts in this regard and was aware of the certification and of the existence of a collective-bargaining contract. ***In these circumstances***, it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good faith doubt about that fact.

NLRB v. Burns Int'l. Sec. Servs., Inc., 406 U.S. 272, 274-75, 278 (1972) [emphasis added].

In contrast to the facts in Burns, the evidence before this tribunal displays a lack of proper notice to and knowledge by Wynn of the purported bargaining obligation of Labor Plus. Specifically, Wynn was not apprised of nor made a participant in the election proceedings. Ms. Taratko testified that Labor Plus did not discuss the existence of the election petition with Wynn prior to the election. Taratko 57:1-3, 20-23. Furthermore, Ms. Coakley did not even learn of the petition until after the May 2, 2015 election occurred and Wynn had already started to hire its own stage technicians. Coakley 90:10-17; 120:10-17.

The Ninth Circuit Court recently stated that "[b]ecause the origins of successor liability are equitable, fairness is a prime consideration in its application." Resilient Floor Covering Pension Trust Fund Bd. of Trs. v. Michael's Floor Covering, Inc., 801 F.3d 1079, 1091 (9th Cir. 2015) [internal citations omitted]. Not surprisingly then, both the Board and Courts recognize that the imposition of collective bargaining agreements on new employers may not be appropriate where the new employer has no knowledge of the collective bargaining agreement.

See, e.g., EPE, Inc. v NLRB, 845 F.2d 483, 488 (4th Cir. 1988) (noting that "[p]rior NLRB decisions suggest that lack of knowledge on the part of an acquirer might preclude enforcement of an agreement following a stock purchase"); MPE, Inc., 226 N.L.R.B. 519, 521 (1976) (stating that "it cannot be said that the stock purchasers and new managers had in any way explicitly assumed the obligations of a contract of which they were unaware"). The Board and Courts have required notice to successors in other contexts as well. Golden State Bottling Co. v. NLRB, 414 U.S. 168, 185 (1973) (noting that the successor must have notice before liability for an unfair labor practice can be imposed); Lebanite Corp. &/or R.E. Serv. Co., 346 N.L.R.B. 748, 751 (2006) ("In order to *balance* the equities of the employees and those of the innocent purchaser, the Supreme Court and the Board are willing to impose liability on the innocent purchaser provided that the purchaser has the opportunity to protect itself in a meaningful way").

The deprivation of Wynn's due process rights is further exemplified by the Union's scheme to evade the Board's representation procedures as they would have pertained to Wynn so that the Union could "trap" Wynn and coercively impose a successor obligation after the fact. See **Jt. Ex. 7** (setting forth the Union's counsel's arguments at the election objection hearing). As noted above, Wynn was not a party to the representation proceeding involving the Union and Labor Plus. Notably, unlike Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 (August 27, 2015), which specifically identified both BFI Newby Island Recyclery and Leadpoint Business Services as the employer in the Petition for Election, the petition underlying the present matter only named Labor Plus as the employer.

> The fundamental elements of procedural due process are notice and an opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). Congress incorporated these notions of due process in the Administrative Procedure Act. Under the Act, "[p]ersons entitled to notice of an agency hearing shall be timely informed of...the matters of fact and law asserted." 5 U.S.C. § 554(b). To satisfy the requirements of due process, an

> administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Bendix Corp. v. FTC, 450 F.2d 534, 542 (6th Cir. 1971). Additionally, "an agency may not change theories in midstream without giving respondents reasonable notice of the change." Id. (quoting Rodale Press v. FTC, 407 F.2d 1252, 1256 (D.C. Cir. 1968)).

Lamar Cent. Outdoor, 343 N.L.R.B. 261, 265 (2004).

The facts of Alaska Roughnecks & Drillers Ass'n v. NLRB, 555 F.2d 732 (9th Cir. 1977), are apropos to the present case. In Alaska Roughnecks, Mobil operated an offshore drilling platform and subcontracted the drilling operations to Santa Fe Drilling. Although Mobil fixed the employee work schedules and provided helicopter transportation to and from the platform, the employees were on Santa Fe's payroll and Santa Fe paid their insurance, taxes and other deducted items. Mobil's foremen generally gave direction. During the period of Mobil's contract with Santa Fe, the Alaska Roughnecks Union filed a petition to represent Santa Fe employees. The union stipulated that Santa Fe was the employer, and no claim was made that Mobil was the employer or joint employer.

The union was subsequently certified as the bargaining representative, and Santa Fe thereafter notified Mobil that its rates would increase as a result of higher wages. Mobil thereafter sought new bids for the operation and ultimately terminated its contract with Santa Fe. Id. at 734. Santa Fe notified the union of the termination of the Mobil contract. The union, for the first time, then asked Mobil to bargain as a successor employer. After Mobil refused, the union filed unfair labor practice charges, and the Board ultimately found Mobil to be a joint employer. Mobil sought review of the Board's decision before the Ninth Circuit Court of Appeals. Id.

The Ninth Circuit Court found that Mobil could refuse to bargain when it was denied the opportunity to participate in the certification proceedings, and not requested by the union to bargain until after its contract with Santa Fe was terminated. Id. at 735. The Ninth Circuit Court

also found that, as here, the first notice Mobil received that anyone believed it to be an employer of Santa Fe's employees was when the union asked it to bargain. Id. The Ninth Circuit stated, "Because Mobil had already terminated its contract with Santa Fe, the notice was clearly untimely." Id. The Ninth Circuit Court held that the notice and opportunity to be heard were "wholly inadequate," and therefore Mobil was denied due process. The Court also found that, "the representation proceeding, not the unfair labor practice proceeding, is where employer status should be litigated. Because Mobil had no opportunity to participate in the representation proceeding, it was not accorded due process." Id. at 736.

The Ninth Circuit Court is not alone in its reasoning. In particular, the Seventh Circuit Court of Appeals has stated, "We find the Ninth Circuit's reasoning persuasive, and adopt its sound approach. We believe, however, that it is the Act, not the Constitution, which requires that the Board be bound by its determinations in certification proceedings. ***The regulations that require the identification of the employer in the certification petition are mandatory***. See 29 C.F.R. §§ 102.61(e), 102.63." Cent. Transp., Inc. v. NLRB, 997 F.2d 1180, 1186 (7th Cir. 1993) [emphasis added]. Similarly, the D.C. Court of Appeals has reasoned that the "Board's regulations require that '[a] petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:...The name of the employer.' 29 C.F.R. § 102.61(a)(1). When, as here, the parties stipulate to the employer, the stipulation is binding on the parties absent a showing of 'changed or unusual circumstances entitling [a party] to withdraw its stipulation.'" Computer Assocs. Int'l, Inc. v. NLRB, 282 F.3d 849, 852 (D.C. Cir. 2002) [internal citations omitted].

The instant matter is precisely in line with the aforementioned authorities. Wynn was not afforded an opportunity to participate in the representation proceeding, and was only notified of

its alleged status as a successor employer after it terminated its contract with Labor Plus and when the Union requested to bargain. Had the employees or Union intended to make Wynn an employer of the purported bargaining unit, they should have forthrightly identified Wynn as an employer during the election proceedings and allowed Wynn to participate. Having not done so, the Union cannot wholly ignore Wynn's due process rights and try to impose a bargaining obligation where none exists. Wynn has clearly been denied due process and the Amended Consolidated Complaint against Wynn should be dismissed in its entirety on that ground as well as the fact that Wynn never maintained a majority of Labor Plus stagehands in its employee complement and, as a result, never became a successor to Labor Plus.

IV. CONCLUSION.

For the aforementioned reasons, the Administrative Law Judge should have included as an alternative basis for dismissing the Complaint the fact that Wynn's due process rights were violated. Accordingly, Wynn respectfully requests that the Board modify the Administrative Law Judge's Decision and Recommended Order to include as another basis for dismissal the violation of Wynn's due process rights.

DATED this 30th day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2017, I did serve a copy of **Respondent Wynn Las Vegas, LLC's Brief in Support of Its Cross-Exception to the Administrative Law Judge's Decision and Recommended Order** upon:

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